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No. 1106

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

OTTO REFIOR,

Petitioner,

vs.

LANSING DROP FORGE COMPANY, a Michigan corporation, EMIL M. REFIOR, EDWARD H. REFIOR and ALVA M. CUMMINS,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether any Federal question is involved.

2. Whether the Trial Judge abused his discretion in refusing to grant petitioner more than one week's adjournment on the date set for trial.

3. Whether the affidavit of bias and prejudice filed by petitioner against the Trial Judge was legally sufficient under Section 21 of the Judicial Code.

STATUTES INVOLVED

The Federal Rules of Civil Procedure [48 Stat. 1064, 28 U.S.C.A. 723, (b) (c)], Rule 41(b), provide:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule other than a dismissal for lack of jurisdiction or for improper venue operates as an adjudication upon the merits."

Section 21 of the Judicial Code [36 Stat. 1090, 28 U.S.C.A. 25] provides:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be

entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

STATEMENT

The original bill of complaint was filed in the District Court on September 9, 1935, and the answer of the original defendants was filed on October 11, 1935 (280). General counsel for petitioner at the time of the filing of the original bill of complaint and up to the present time is Alexander H. Schullman, and original local counsel for petitioner was E. J. Davis (15). On January 21, 1936, petitioner made a motion for an order of the District Court to permit petitioner to examine the books, records and affairs of respondent Corporation. This order was granted and signed on January 27, 1936. On February 12, 1936, petitioner asked for the appointment of a Master in Chancery for the purpose of taking testimony, hearing, determination and report, which was denied on February 17, 1936 (33-35).

The cause was brought on for hearing in open court before the Hon. Edward J. Moinet, District Judge, on June 9, 1936, at which time the present general counsel for petitioner was admitted to practice before the District Court, made the opening statement, placed petitioner on the witness stand and conducted the direct examination. Petitioner had subpoenaed in all of the books and records of

respondent Corporation which, if complied with, would have compelled the entire records of the Corporation to be brought before the Court. During the course of the proceedings, counsel for respondents informed the Court that an audit had been ordered on January 27, 1936, at the request of petitioner, but no audit had been conducted, and inasmuch as a large part of the proofs consisted of figures with respect to the affairs of the Corporation much of the time of the Court would be consumed in auditing the books from the witness stand. Judge Moinet then adjourned the case with the consent of petitioner's counsel and over the objection of counsel for respondents to permit petitioner to conduct an audit, and the Trial Court directed the petitioner to make the audit at once and work diligently.

On July 21, 1936, petitioner filed a petition to restrain respondents from holding a meeting of stockholders and directors, and such a restraining order was issued over respondents' objections on July 27, 1936 (280).

On December 18, 1936, new local counsel appeared in the case and filed a petition for an injunction on behalf of petitioner restraining the directors from taking action on behalf of the Corporation, and on December 29th certain action was permitted and other action was restrained by the Court (281).

On June 21, 1937, new local attorneys were substituted as attorneys for the petitioner in place of the attorneys who had appeared in December, 1936. The new local counsel appeared under authority of a contract with the petitioner dated April 1, 1937 (95-96).

On February 7, 1938, an amended and supplemental bill of complaint was filed on behalf of petitioner naming one of the counsel for respondents as a defendant in the proceedings (36-48). Respondents then engaged additional counsel for all of the then defendants and, on April 15, 1938, respondents filed a full and complete answer to the amended and supplemental bill of complaint containing complete audited statements to substantiate the answer (48-78).

On April 29, 1938, the time for petitioner to file answer to the counterclaims of the respondents was extended by stipulation and kept extended at the request of petitioner until May 12, 1938 (282). The answer of petitioner to the affirmative matter contained in the answer of respondents to the amended and supplemental bill of complaint was not filed until June 12, 1941 (131-136).

Application was made by counsel for respondents to Judge Moinet for specific trial date in June, 1938 (114). Because of congestion in the court docket no trial date was set, and in January of 1939 the cause was placed on the trial calendar to be called before the Presiding Judge on February 14, 1939, for the purpose of setting a definite trial date (114). Respondents requested immediate trial, but the case was referred back to Judge Moinet to set trial date.

In December, 1939, Frank W. Atkinson, of Atkinson & Donnelly, entered the case as new local counsel for the petitioner, and filed a petition for restraining order against any action by the directors of respondent Corporation. During the course of that proceeding, counsel for respond-

ents again requested a definite trial date and Judge Moinet suggested that proofs be taken before a Special Master. Counsel for petitioner agreed that this could be done, and an order of reference was prepared by counsel for respondents. Counsel for petitioner then refused to approve the order and Judge Moinet finally set October 1, 1940, as the trial date (115). Local counsel for the petitioner could not try the case at that time and, on October 30, 1940, notification was received by all counsel from the Hon. Frank A. Picard, District Judge, that the case would be called on November 8, 1940, to set a definite trial date. At the hearing before Judge Picard, this date was set for January 7, 1941.

On December 31, 1940, local counsel for petitioner advised Judge Picard and counsel for respondents that he could not take up the case on January 7, 1941, but could take the case up after January 21, 1941 (116). Inasmuch as counsel for petitioner could not proceed to trial before Judge Picard on January 7, 1941, the Judge suggested that if the proofs could be taken before the Master he would not require counsel for petitioner to proceed on January 7th. Thereupon counsel for petitioner requested that the case be referred to the Master, and Judge Picard stated to all counsel that he would be away from Detroit during February, 1941. Judge Picard instructed counsel for petitioner to prepare an order of reference to the Master, but no such order was prepared between December 31, 1940, and January 8, 1941. Counsel for respondents reported this fact to Judge Picard, and he ordered counsel for respondents to prepare the order of reference and submit it for his signature, which was done. This order (78-80) was a general order of reference. A copy of the order was immedi-

ately given to counsel for the petitioner and Judge Picard was in Detroit between the date of the entry of the order of January 8th and the early part of February, 1941. Also, on January 8, 1941, the Special Master advised all counsel in writing that the case was definitely set for hearing before him on February 17, 1941 (117).

On February 13, 1941, and after Judge Picard had left the City, petitioner filed a motion to revoke the order of reference and set the cause down for hearing in open court (80-82). This petition was noticed for hearing before Judge Picard on March 3, 1941 (82). Respondents' counsel appeared before the Master on February 17th, the date set for hearing, and announced that the respondents were ready for trial. Petitioner and his counsel did not appear and the Master refused to proceed during the absence of Judge Picard. Respondents thereupon filed a petition for a decree dismissing the bill of complaint and dissolving the restraining orders and allowing costs (83-89). This petition was also noticed for hearing before Judge Picard on March 3rd (83).

The Special Master sent out notices of hearing to all of the counsel in the case, including the local counsel for petitioner under the contract on pages 95 and 96 of the Record. When the local counsel received the notice of hearing they filed a petition asking for an order fixing fees and restraining other counsel from proceeding on behalf of the petitioner until such time as they had been paid and properly substituted (90-96). This petition was also noticed for hearing on March 3, 1941.

All three motions set for hearing on March 3, 1941, came on for hearing before Judge Picard on April 28, 1941. At

that time Judge Picard entered an order denying the motion of the petitioner to revoke the order of reference and denying the motion of the petitioner to set the cause for hearing in open court (97). On the following day Judge Picard entered an order restraining Atkinson, Donnelly & Lyon from appearing in the proceedings on behalf of the petitioner until such time as Griffin, Heal & Emery had been paid for their services and had signed a proper substitution (97).

After hearings on the motions had been had before Judge Picard on April 28, 1941, local counsel for the petitioner communicated with Judge Picard and requested that the motions all be held in abeyance until the general counsel for the petitioner, who was in Los Angeles, California, could appear personally before Judge Picard, and general counsel, Alexander H. Schullman, wired Judge Picard from California (248-249) requesting a later trial date. Judge Picard immediately replied (249) setting the motions for hearing on May 12, 1941.

On May 12, 1941, all parties were represented by both general and local counsel for hearing on the motions as set by Judge Picard (146-165). Notwithstanding the fact that Judge Picard had previously denied the motion of petitioner to revoke the order of reference (97), he again heard the motion and also heard the motion of respondents to dismiss the cause. At the same hearing Judge Picard ordered the petitioner to put up a bond to protect the fees which were due and owing to Griffin, Heal & Emery (163). On the motion to revoke the order of reference, the Trial Court stated that he would examine the cases and determine the matter by 5:00 o'clock in the afternoon (165) so

that in the event the order of reference was to remain effective the matter could proceed before the Master on the following day. The Trial Court advised the attorneys present in open court to get ready to at least put in the audit before the Master (165). During the afternoon of that day, the Trial Judge directed the counsel for respondents to prepare a limited order of reference limiting the testimony and evidence before the Master to the audits of the records and books of respondent Corporation (106-107). On the same date, May 12, 1941, petitioner filed a new motion for a stay of all proceedings pending appeal from the limited order of reference entered by Judge Picard earlier on the same date (110-112).

In accordance with the limited order of reference of Judge Picard, the cause came on for hearing on the audits before the Special Master on May 13, 1941 (257-273). At that time petitioner's general counsel, Mr. Schullman, and his local counsel, Mr. Atkinson, appeared before the Master on behalf of petitioner and requested an adjournment of the hearing before the Master for two weeks to perfect an appeal to the United States Supreme Court. After a full statement of the facts (258-273), the Special Master decided that the entire question should be resubmitted to Judge Picard. An adjournment was taken until 2:00 o'clock of that date, when the parties appeared through their various counsel, including both general and local counsel for the petitioner, before Judge Picard (273-277). Judge Picard refused to adjourn the hearing and directed all parties to go back before the Special Master and submit proofs with reference to the audits in accordance with the previous limited order of reference. The hearing was again called before the Master directly after the proceed-

ings before the Judge (277). Messrs. Schullman and Atkinson, general counsel and local counsel for petitioner, came in, served counsel for respondents with a copy of the motion for stay of proceedings and immediately left. After waiting a suitable time, respondents then put in the testimony covered by the audits of the respondent Corporation in accordance with the previous directions of Judge Picard, and this proceeding took two days (277-279).

After the hearing had before the Special Master, the general and local counsel for the petitioner went back to Judge Picard and pleaded with him to have the case set for trial in open court. Judge Picard acceded to this request and suggested to counsel for the petitioner that they consult with counsel for respondents as to a proper order in connection therewith (238). Accordingly counsel for petitioner and counsel for respondent approved in writing a formal order on May 22, 1941, which was entered by Judge Picard on the same date (120-121), in which it was recited that counsel for the respective parties had stated in open court that they were ready for trial. Thereupon the cause was set peremptorily for trial on June 17, 1941, before the Trial Judge. It was further provided in the order that if either party did not appear for trial on that date a default might be entered and the case tried as a default case. It was also provided that the testimony submitted by the respondents to the Special Master could be read into the record at the trial before the Judge, and that the respondents would produce the witnesses for cross-examination (121). Petitioner was not to be prejudiced in any way by his failure to participate in the hearings before the Master on May 13 and 14, 1941. The Judge had previously entered an order denying the respondents' motion to

dismiss the bill of complaint because of the failure of the petitioner to appear before the Master in accordance with the order of the Court (105).

Between May 22, 1941, and the date set for trial by the Judge and on June 10, 1941, Griffin, Heal & Emery filed a petition for an order framing issues and determining the conditions upon which substitution could be had, which was a matter solely between the petitioner and Griffin, Heal & Emery (125-131).

On June 16th the petitioner filed a bond to protect the claim of Griffin, Heal & Emery (137-138). On June 17th, which was the date set for trial, and when all parties were present by both their general and local counsel, the hearing was opened by a request by Mr. Griffin for certain changes in the bond which had been filed by the petitioner to protect the claim of Griffin, Heal & Emery (166-201). Questions arising between Griffin, Heal & Emery and the petitioner were of no concern of the respondents. During the progress of this hearing the Trial Judge and general counsel for the petitioner, Mr. Schullman, differed regarding the practice of Mr. Schullman in connection with the bond filed by the petitioner for the protection of Griffin, Heal & Emery. The Judge finally directed Mr. Schullman to make certain changes in the bond and then stated that he would proceed with the trial of the case (178).

At that point one of the local counsel for the petitioner asked the Court for a short recess to discuss the question of local counsel proceeding further in the case (178). When Court reconvened after the recess, Messrs. Atkinson and Donnelly, as local counsel, withdrew from the case (179).

Thereupon Mr. Schullman requested "a couple months' " adjournment for the purpose of securing new local counsel (181). Respondents objected to this adjournment, and after considerable discussion of the entire question (181-191) the Court announced that the case would proceed at 2:00 o'clock in the afternoon. When Court reconvened pursuant to the adjournment, local counsel and general counsel for the petitioner requested an adjournment from the Court (191-201). After listening to all of the arguments, the Trial Judge agreed to give the petitioner a one week's adjournment upon the payment of $100.00 costs (199-200). Plaintiff refused to accept one week's adjournment upon payment of costs and refused to go on with the case (200). The petitioner did not ask for voluntary dismissal of the bill of complaint. The Trial Judge thereupon ordered the decree dismissing the bill of complaint with prejudice (200). The decree was entered on the following day, June 18, 1941 (138-139).

Nine days after the entry of the final decree, and on June 27, 1941, petitioner, through his general counsel, filed a motion to set aside and vacate the final decree of Judge Picard dismissing the bill of complaint and to continue the date of trial to permit petitioner to secure local counsel and to proceed on an affidavit of bias and prejudice (140-144). On July 7, 1941, respondents filed an answer to this motion denying all of the material allegations (213-217). About two weeks after the final decree had been entered and on July 3, 1941, petitioner filed an affidavit of bias and prejudice against Judge Picard (201-213). On July 7th respondents filed a motion to strike the petitioner's affidavit of bias and prejudice from the files as legally insufficient (218-222). The motion of the petitioner to set aside

and vacate the decree and the motion of the respondents to strike the affidavit of bias and prejudice from the files and the question of taxation of costs came on for hearing before Judge Picard on July 7, 1941. Petitioner appeared by his general counsel, Mr. Schullman, and respondents appeared by local counsel (223-234). Judge Picard directed that an order be entered denying the motion of petitioner to set aside and vacate the decree and granting the motion of respondents to strike the affidavit of bias and prejudice from the files and tax respondents' costs (222-223). On July 16, 1941, petitioner filed notice of appeal to the Circuit Court of Appeals (251). Approximately one month later and on August 18, 1941, petitioner's general counsel filed a self-serving affidavit which is not properly a part of this proceeding (235-250).

On September 23, 1941, petitioner filed a motion in the Circuit Court of Appeals to restrain respondents from holding a meeting of stockholders and directors (288-295). Such a restraining order was entered by the Circuit Court of Appeals on September 23, 1941 (295-296). The appeal was argued and submitted on December 3, 1941, and a decree was entered by the Circuit Court of Appeals on January 5, 1942, affirming the decree of the District Court after written opinion by the Circuit Court of Appeals (297-307). The opinion is reported in 124 Fed. (2d) 440.

On February 10, 1942, petitioner asked for an extension of the restraining order and filed a petition for rehearing. The petition for rehearing was denied on February 13, 1942 (383), and the Circuit Court of Appeals stayed the mandate and denied the motion for continuance of the restraining order on March 6, 1942 (396).

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ARGUMENT

I.

Respondents contend that no Federal question is involved.

Petitioner contends that he is entitled to a writ of certiorari because the Circuit Court of Appeals for the Sixth Circuit has decided a Federal question in a way which he contends is in conflict with the applicable decisions of this Court, and states further that the Court of Appeals had declined to apply the rule of this Court as set forth in *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, and on the contrary had applied its own rule as set forth in *Olsen v. Muskegon Piston Ring Co.*, 117 Fed. (2d) 162.

Respondents contend that there is no conflict whatever between the rulings of the two cases cited by petitioner. In the *Swan Land & Cattle Co.* case this Court stated very clearly that the question presented for its consideration and determination was whether a trial court can entertain jurisdiction of a suit in equity which unites and seeks to enforce both legal and equitable demands, when the right to the equitable relief sought depends upon the legal claim being first ascertained and established, and where the person against whom the legal demand is ascertained is not made a party defendant to the proceedings. It appears from the opinion in the case that certain individual defendants in Illinois were made parties and served with process. They demurred to the bill on several grounds, one of which was that certain corporations were necessary parties to the suit. The lower court sustained the demurrer and dismissed the bill with prejudice, and the question was before this Court as to whether or not the demurrer was

properly sustained. This Court held that the bill was properly dismissed but that the dismissal should have been without prejudice for two reasons, one that the complainant should have reduced its claim to damages in a law action before coming into equity for the enforcement of the claim, and that indispensable parties defendant had not been joined in the proceedings.

In the case of *Olsen v. Muskegon Piston Ring Co.*, supra, the Circuit Court of Appeals for the sixth Circuit was considering the question as to whether or not a dismissal order in a former case constituted a bar to the prosecution of the second proceeding. The prior case had been dismissed with prejudice because of failure of counsel for plaintiff to proceed to trial when directed by the Trial Court. The Appeals Court held that opportunity to be heard gave the plaintiff his day in court and the dismissal was justified. It also held that a judgment on the merits does not require a trial when the parties are all before the Court and subject to the orders of the Court as to procedure. The facts of the *Muskegon Piston Ring Co.* case and the *Swan Land & Cattle Co.* case were entirely different, and there is no conflict between the two cases. Since the *Swan Land & Cattle Co.* case the Federal Rules of Civil Procedure in Rule 41(b), cited above, have definitely given the Trial Court the right to dismiss an action for failure of the plaintiff to prosecute or comply with the rules or any order of the Court, and in the event of such dismissal it operates as an adjudication upon the merits under the terms of the rule. There is clear authority for the action taken in the instant case by the Trial Judge.

II.

Respondents contend that the Trial Judge did not abuse his discretion in refusing to grant the petitioner more than one week's adjournment on the date set for trial of this cause.

There can be no question about the discretion of the Trial Judge to dismiss a cause under the circumstances. *Hicks v. Bekins Moving & Storage Co.*, 115 Fed. (2d) 406-408.

Petitioner contends that the Trial Judge abused his discretion in not permitting petitioner to have an extended adjournment for the purpose of securing new local counsel after the withdrawal of the local counsel that petitioner then had on the date set for trial. Respondents contend that not only did the Trial Judge use proper discretion in denying the motion for continuance, but that the Trial Judge exercised extraordinary caution in seeing that the interests of the petitioner were protected. The statement of this case appearing above will show conclusively that the petitioner not only had one opportunity to present his evidence to the Court to substantiate the allegations of his bill of complaint, but that he had innumerable chances to do so, all of which he avoided by what general counsel for petitioner apparently considered adroit and clever shifting of position in a deliberate attempt to embarrass the respondents and the Trial Judge.

At the expense of possible repetition, counsel for respondents desire to point out the opportunities given to the petitioner to present his case to the Court. Ordinarily a plaintiff who files a bill of complaint is supposed to be ready to present his case at any time after the cause is at issue, and in such a way as to constitute orderly procedure under the rules of Court. Petitioner filed his bill of com-

plaint in September, 1935. In January, 1936, he was given the right to make an audit of the affairs of the respondent Corporation for the purpose of presenting evidence to the Court to substantiate his allegations. He failed to do this and came into Court in June of 1936 wholly unprepared to present his proofs in an orderly way. The Trial Judge adjourned the case and instructed the petitioner to procure an audit and work diligently. From June of 1936 to February of 1938 the only activities of the petitioner consisted of securing two new firms of attorneys and securing restraining orders preventing any directors' and stockholders' meetings of the respondent Corporation. As a result of the insistence by the then counsel for the respondents that the case be tried, the amended and supplemental bill was filed in February of 1938, and after respondents' answer was filed in April, 1938, the case was then again ready for trial. From April, 1938, to October, 1940, petitioner continued to rest upon restraining orders secured by his counsel to prevent any action by the respondent Corporation, and in October, 1940, when Judge Moinet set the case for trial definitely, local counsel for petitioner secured an adjournment because he could not try the case at that time. When the case was again set for trial on January 7, 1941, counsel for petitioner began a series of maneuvers to avoid the trial of the case which are without parallel in the knowledge of counsel for respondents. In order to avoid going to trial before Judge Picard on January 7, 1941, so that the trial of the case could be concluded before Judge Picard left the City on his vacation, petitioner's local counsel requested the Judge to refer the cause to the Master to take proofs. After the case had been set for trial by the Master on January 8, 1941, petitioner did not object to the order of reference until February 13th, when he filed a

motion to revoke the order of reference appearing on pages 108 to 110 of the Record. Local counsel had been advised that Judge Picard would be out of the City during February, so it is conclusive that the motion to revoke the order of reference was deliberately held up until Judge Picard had departed, and local counsel therefore knew that any motion filed in February in this case could not be heard until Judge Picard would return in March of 1941. In the opinion of respondents' counsel, this constituted sharp practice which should merit severe criticism by the Court.

When Judge Picard returned from his vacation in March of 1941 and discovered that counsel for petitioner had not only been guilty of sharp practice with respect to the motion filed during his absence, but that he had secured new local counsel without securing a substitution from his other local counsel with whom the petitioner had a specific written contract, set forth on pages 95 and 96 of the Record, Judge Picard was, as we believe, rightfully indignant and very properly ordered petitioner to make arrangements to pay his discharged local counsel as a preliminary to further proceedings in the case. Although Judge Picard advised the general counsel for the plaintiff on April 29, 1941, that petitioner's former counsel would have to be paid (249), petitioner's general counsel sought by every means possible to avoid this proper order of the Court and did not file the bond to secure the former counsel until June 16, 1941, which was just one day prior to the time that the case was scheduled to be tried in open court, and which was approximately one month after counsel for petitioner had been notified that he would have to submit his case to the Special Master. On this phase of the case, petitioner received every consideration from the Trial Judge consistent with proper protection of petitioner's former counsel.

Notwithstanding the fact that petitioner had requested the reference to the Master in order to avoid going to trial in January, 1941, petitioner then sought to avoid presenting his evidence before the Master by filing motions to vacate the order of reference, claiming that the issues in the case should not be submitted to the Master (80-82 and 108-109). At the time of the argument before the Court with respect to the motion to vacate the order of reference petitioner's general counsel argued (146) that the order of reference was made without the approval of petitioner or his general counsel. Petitioner's general counsel would not accept the fact that petitioner's local counsel, Frank W. Atkinson, who petitioner's general counsel had advised the Court was his authorized local counsel (248-249), had requested the reference. The Trial Judge very properly put general counsel for the petitioner straight on this important point and then the general counsel for petitioner insisted that all matters of fraud be heard by the Court, whereupon the Trial Judge ruled that the reference should be limited to testimony as to the audits of the books and records of the respondent Corporation. Accordingly a limited order of reference was entered by the Trial Judge (106-107). Immediately upon the entry of this order petitioner moved for a stay of all proceedings pending an appeal from the limited order of reference. However, notwithstanding the fact that both the general and local counsel for petitioner appeared before the Master to make a statement (257-273), petitioner's counsel did not participate in any proceedings before the Master and did not accept the opportunity then presented to offer testimony by means of audits which would substantiate the allegations of the original and amended bills of complaint. The proceedings before the Master continued for two days, on May 13 and

14, 1941. Respondents at that time introduced full and complete testimony with regard to all of the facts and figures set up in the respondents' answer to the amended and supplemental bill of complaint.

Counsel for respondents believe that up to this point petitioner had had ample opportunity to present his case to the Court, but notwithstanding all the chances presented, counsel for petitioner again went to Judge Picard and asked him to reconsider the question of having the entire case tried before the Trial Judge. Although counsel for respondents considered that there was no basis whatever for any further consideration to the petitioner, the Trial Judge stated that he wanted the petitioner to have the chance to present his case in open court, and thereupon the general counsel for petitioner, the local counsel for petitioner and the attorneys for the respondents entered into a stipulation by means of an order of the Court approved by counsel for both parties in writing (120-121), whereby it was recited that both parties were ready for trial and the cause would be set peremptorily for trial on June 17th, and if either party was not ready at that time the cause would be tried as a default case. It was further provided that the petitioner was not to be prejudiced in any way by the fact that testimony had been taken by the Master on May 13th and 14th. This is positive and conclusive proof that on May 22, 1941, the petitioner and his general and local counsel all understood that this case would go on for trial on June 17th, and that there would be no further adjournments of any kind. Any attorney who had been through all of these preliminary proceedings should know definitely after such an order by the Court that there would be no adjournments beyond June 17th. Notwithstanding this, general counsel

for petitioner came into Court on the morning of June 17, 1941, and counsel for respondents believe and charge that he deliberately created a situation which he thought would result in a further adjournment of this case by having local counsel for the petitioner withdraw and then requesting an adjournment to secure other local counsel. Counsel for respondents charge, further, that the Trial Judge was extremely mild in dealing with this palpable instance of sharp practice. Notwithstanding everything that had gone before, which was certainly more than enough to test the patience of any Trial Judge and bring it to the breaking point, Judge Picard retained his composure and against serious objection by counsel for respondents offered the petitioner a further week's adjournment upon payment of costs of $100.00 (200). In other words, Judge Picard, notwithstanding all the opportunities which had been given the petitioner to put in his case, all of which had been successively refused or avoided by petitioner, gave him one last final chance to present his case to the Court. He again refused and thereupon the Trial Judge entered a decree dismissing the original and amended and supplemental bills of complaint. If any abuse of discretion was involved in the Trial Judge's many orders in favor of the petitioner, it consisted of the requirement that the respondents be ready for trial on many occasions at a considerable expense with out-of-town witnesses, and for Master's fees and other expenses which are incidental to trials of this nature with an allowance of only $100.00 to cover all this expense. The allowance of $100.00 did not cover the expense incurred and paid by respondents in presenting the case before the Master, not to mention all of the many days spent by counsel for respondents and the time of respondents and their

auditors in appearing in Court in vain attempts to get the petitioner to put in his case.

Petitioner is in the anomalous position of contending that his local counsel had no authority to consent to the reference to the Special Master, and that any requests of that nature must be approved by general counsel, and he then argues that the Court abused its discretion in not granting him a further adjournment to procure other local counsel to try the case. If his general counsel were so completely in charge of the proceedings as to have to pass on all orders of reference, etc., he should certainly be in a position to try the case when it was reached for trial notwithstanding the withdrawal of local counsel.

Counsel for respondents have good authority for denominating the tactics of counsel for petitioner as sharp practice. In the case of *Lipscomb v. United States,* C.C.A. 8, 33 Fed. (2d) 33-34, the Court said:

> "For about two months after arraignment accused made no move to disqualify the Judge although he had full knowledge during all of that time of every fact which he relied upon for disqualification. He waited until a few days before the time set for trial. The natural consequence of such action would be to secure a continuance. Such sharp practice will not avail and has in similar instances been condemned by this Court. *Bishop v. U. S.,* 16 Fed. (2d) 410; *Rossi v. U. S.,* 16 Fed. (2d) 712, 716."

Respondents therefore contend that unquestionably the answer to question 2 is that the Trial Judge did not abuse his discretion in refusing to grant the plaintiff more than one week's adjournment on June 17, 1941, when this case

was supposed to have been ready for trial peremptorily in accordance with the previous order of the Court under date of May 22, 1941 (120-121). Petitioner contends that the order of the Trial Court that the case be tried as a default case in the event either party was not ready for trial would require that the case be dismissed without prejudice. This is not true, for when a default case is tried the party not in default has a right to have a decree in his favor with prejudice, and the provisions of the Court Rule 41(b), as set forth above, show conclusively that the Trial Judge was correct in dismissing the case with prejudice.

III.

The affidavit of bias and prejudice filed by petitioner against the Trial Judge was legally insufficient under Section 21 of the Judicial Code for the following reasons:

A. Section 21 of the Judicial Code provides that an affidavit of personal bias or prejudice on the part of the Trial Judge can only be filed when such affidavit states facts and reasons for a belief that a judge has a personal bias or prejudice against the party filing such affidavit or in favor of any opposite party to the suit.

B. An affidavit of bias and prejudice must be filed not less than ten days before the beginning of the term of court or good cause must be shown for the failure to file it within such time.

A.

The quoted section of the Judicial Code provides that an affidavit of bias and prejudice shall state the facts and the

reasons for the belief that a bias or prejudice exists against a party. Examination of the affidavit of bias and prejudice filed in this case shows clearly that the entire affidavit is based upon remarks made by the Trial Judge about the general counsel for petitioner, Mr. Alexander Schullman. At no place in the affidavit are any facts set forth which would show or tend to show that the Trial Judge had any bias or prejudice against the petitioner or his case.

The affidavit must be strictly construed and strictly conform to the statute. *Henry v. Harris,* 191 Fed. 868, *Keown v. Hughes,* 265 Fed. 572, *Fieldcrest Dairies v. City of Chicago,* 27 Fed. Supp. 258.

Respondents therefore contend that all of the allegations contained in the petitioner's affidavit of bias and prejudice which refer to comments by the Trial Judge about Alexander H. Schullman are not properly a part of such an affidavit. The only portion of the affidavit referring to the petitioner himself appears on page 203 of the Record where the Trial Judge said:

> "Well, Mr. Refior has borne with you through seven or eight firms of attorneys and I don't know as he wants to change his tactics now."

This lone statement does not set forth a fact which is sufficient to cause the Trial Judge to disqualify himself as being biased and prejudiced against the petitioner in the manner contemplated by the Act.

B.

In one of the first cases to arise after the enactment of the provision of the Code permitting affidavits of bias and prejudice, the Trial Judge in *Ex Parte Glasgow*, 195 Fed. 780, held that the Legislature intended the affidavit to be filed before the trial of the case unless good reason to the contrary be shown. The Lower Court held further that it would require specific language in the Act to permit such an affidavit to be filed after a case had been tried. The case was appealed to the United States Supreme Court as *Glasgow v. Moyer*, 225 U. S. 420. The Supreme Court affirmed the District Court and quoted from the District Court opinion with reference to the petition and discharged a writ of habeas corpus, thereby approving the ruling of the Trial Court holding the affidavit legally insufficient under the Code.

In *Ex Parte American Steel Barrel Co.*, 230 U. S. 35, the Supreme Court of the United States stated that the provision was obviously not applicable except in rare instances in which the affiant was able to state facts which tended to show not merely adverse rulings but facts and reasons which tended to show personal bias and prejudice. The Court also stated that it was not intended to paralyze the action of a judge who has heard a case or any question in the case, and that this was indicated by the plain provision of the Act that the affidavit be filed not less than ten days before the beginning of the term.

The Sixth Circuit Court of Appeals ruled upon the requirements of the Code in connection with such an affidavit

in *Shea v. United States,* 251 Fed. 433. In that case the term of the District Court began on October 31st. The case was assigned for trial on December 4, 1916. On that date the plaintiff in error asked that the case be adjourned for a few weeks and the case was set down for trial on Monday, January 8, 1917. On Saturday, January 6, 1917, when jurors had been summoned and witnesses for the Government at distant places had been subpoenaed, an affidavit of bias and prejudice was tendered for filing but refused by the Trial Judge. The Court held that the Trial Judge rightly refused to consider the application and that technically the application came too late. The Court said:

> "We rest our affirmance of the action of the District Judge upon the ground that the affidavit of disqualification was not tendered in due season, and that the circumstances were such as to justify belief that the affidavit was purposely held back and its use on the eve of trial resorted to for the purpose of securing a postponement. The better practice would have been to permit the affidavit to be filed and then strike it from the file, thus preserving a more complete record."

The Court also held in the same case that as an appeal court it had no right to review the action of the Trial Court in refusing to grant a further adjournment unless it clearly involved an abuse of discretion, and the Court held that this case did not present any abuse of discretion. In many of its facts the case cited is comparable to the case now under consideration by this Court. In the case cited, defense counsel asked a postponement on the day set for trial for the reason, among others, that one of the attorneys for the defendant was giving up his defense at that time and new counsel would not have time to prepare. The counsel

who made the application for the adjournment and who actively tried the case had been retained on the evening of the previous day, and yet the Court held that it was not an abuse of discretion to deny an adjournment. We submit the case is ample authority for affirming all of the action taken by the Trial Judge in this case.

Chafin v. United States, 5 Fed. (2d) 592, certiorari denied 269 U. S. 552. An affidavit of bias and prejudice was filed against the District Judge just before trial was to start and the Judge refused to allow the affidavit to be filed and proceeded with the trial. The Circuit Court of Appeals for the Fourth Circuit affirmed the Judge's action. In this case the indictment was not returned until after the term of court at which the defendant was to be tried had commenced. Defendant appeared on September 20, 1924, and was admitted to bail and trial set for October 6th. On the morning of October 6th the case was called for trial and, at the request of defendant's counsel, was postponed until the afternoon. The District Attorney refused to grant a continuance and at the afternoon session the affidavit of bias and prejudice was tendered by defendant's counsel. The Judge refused to receive it or allow it to be filed because it had not been seasonably presented and because the purpose of the presentation was to obtain a continuance. The Circuit Court of Appeals held that the affidavit was not seasonably filed and said:

> "There is no escape from the conclusion that the defendant on September 20, 1924, knew everything alleged to show bias and prejudice of the presiding judge that he knew on October 6 following, and that he delayed presenting his affidavits for sixteen days."

The Court then analyzed the statute and the legislative intent and held as follows:

> "But the statute was not intended to make this right and privilege of removing a judge from the bench unlimited and arbitrary. Its language and spirit require of the defendant, as the price of the privilege bestowed, such diligence in its use as will give the least inconvenience and expense to the opposing party and obstruct as little as possible the due course of the administration of justice. A statute can rarely provide in express terms for all possible contingencies. The Legislatures and the people must depend on the courts to give statutes such interpretation as will express their spirit and tenor, applying them when the case is clearly within the right to be protected or the mischief to be remedied.
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> "Here the defendant, in deliberately and unfairly withholding his challenge of the judge until the day of trial, violated both the letter and spirit of the statute and can take no benefit under it. *Shea v. United States* (Sixth Circuit) 251 F. 433, 163 C. C. A. 451."

Cuddy v. Otis, C.C.A. 8th, 33 Fed. (2d) 577:

> "The foregoing pronouncements are decisive of this application. The only facts and reasons assigned for the prejudice alleged to exist are the rulings of respondent upon applications for continuance, made in the exercise of judicial discretion and in administration of court rules in such cases made and provided. If such rules are inapplicable, and the rulings made constitute an abuse of sound discretion, the resulting error may be corrected on ap-

> peal. We find in the record before us no support for the affidavit of disqualification, and we cannot indulge the practice of making a mere denial of continuance sufficient foundation for resort to this provision of the Judicial Code."

It was held in *United States v. Parker*, 23 Fed. Supp. 880, that the ten-day provision of the Act is a matter of substance rather than form.

The Trial Judge against whom the affidavit is filed has the right and the duty to pass on the legal sufficiency of the affidavit. *Berger v. United States*, 255 U. S. 32; *United States v. Gilbert*, 29 Fed. Supp. 507; *Fieldcrest Dairies v. City of Chicago*, 27 Fed. Supp. 258; *United States v. Buck*, 18 Fed. Supp. 827.

The proper procedure in the event the Trial Judge finds the affidavit is legally insufficient is to strike it from the files. *Shea v. United States*, 251 Fed. 433; *Flegenheimer v. United States*, 110 Fed. (2d) 379.

Bishop v. United States, 16 Fed. (2d) 410-411:

> "A new means of securing continuances would result from holding that such affidavits of prejudice where the facts are known long before may be held until the last moment before trial and then filed.
>
> • • •
>
> "A defendant should not be compelled to try his case before a judge who has expressed prejudice against him. On the other hand, every consideration of fair dealing with the court requires that parties

> complaining of the prejudice must not make the statute a mere instrumentality for delay. That was not the purpose of its enactment."

Wilkes v. United States, C.C.A. 9th, 80 Fed. (2d) 285-289:

> "The affidavit further states that counsel for the defendants requested Judge Cosgrave to postpone the trial of this case from May 16 to June 6, 1933, and that he declined to postpone it to June 6, but did postpone it to May 23, 1933. These rulings cannot be made the basis of a charge of personal bias or prejudice. *Berger v. United States*, supra; *Ex parte American Steel Barrel Co.*, supra; *Minnesota & Ontario Paper Co. v. Molyneaux* (C. C. A.) 70 F. (2d) 545, 547; *Craven v. United States* (C. C. A.) 22 F. (2d) 605, 608. The affidavit sets out at length the colloquies which, on information and belief, are said to have occurred between court and counsel on the two occasions when this request was presented and considered. We find therein nothing from which a fair inference of bias or prejudice may be drawn."

Also see *Tennessee Publishing Co. v. Carpenter*, C.C.A. 6th, 100 Fed. (2d) 728-734.

The quoted section of the Code provides that if an affidavit of bias and prejudice is not filed ten days before the beginning of the term of court, good cause must be shown for the failure to file it within such time, and the authorities are clear that any party filing such an affidavit must do so immediately upon discovery of the facts upon which such an affidavit is based. In this case the Record is clear that on May 12, 1941, when the parties were before the Trial

Judge on the question of reference to the Master, the Judge definitely expressed himself as critical of the attitude of the general counsel for the petitioner. Inasmuch as the affidavit of bias and prejudice is based upon the critical attitude of the Trial Judge toward the general counsel, the petitioner and his general counsel were entirely aware of the things complained of in the affidavit of bias and prejudice on May 12, 1941. For record of that proceeding see Record 146-165. Again on May 13, 1941, all counsel were before the Court (273-277). The Court at this time again expressed himself as being firm about the case proceeding and that he would not longer entertain any motions for continuance upon any ground. The Court at that time told the local counsel for the petitioner that he was disgusted with the tactics of the petitioner and that he would not let the petitioner and his counsel play "horse" with the Court any longer (276-277). Counsel for respondents therefore claim that the petitioner was fully apprised of the attitude of the Judge toward petitioner's general counsel as early as May 12th and 13th, 1941, and when the case was called for trial before Judge Picard on June 17th more than a month had elapsed, during which the petitioner did not file any affidavit of bias and prejudice. Petitioner now contends, through his general counsel in his affidavit of bias and prejudice (201), that while he was aware of the bias and prejudice of the Judge before the trial date on June 17th which must have therefore existed in his mind on May 12th and 13th, he did not file the affidavit of bias and prejudice at that time because his counsel advised him that the prejudice which he considered existed at that time would disappear from the mind of the Judge at the trial of the case (201-202). It is therefore clear that the petitioner under his own statement knew of the alleged bias and pre-

judice for over one month before the case was called for trial, and his failure to file the affidavit during that period is fatal under the Act and the authorities cited.

If this Court should decide that the affidavit states facts and reasons which substantiate a charge of bias and prejudice on the part of the Trial Judge and that good cause was shown for failure to file the affidavit before June 17th, notwithstanding all that, we still contend that the affidavit of bias and prejudice should be stricken from the files because it was not filed until two weeks after the final decree was entered, and certainly the Act does not permit such an affidavit to have any force or effect whatever when filed after a final decree has been entered by the Trial Court. Even assuming that petitioner's allegations are true that he did not fully appreciate the extent of the bias and prejudice of the Trial Judge until June 17th, his general counsel was served on June 17th with a proposed form of final decree and a notice that the decree would be presented before the Trial Judge on June 18th (138-139) at 11:00 A. M. Petitioner therefore had the balance of June 17th and until 11:00 A. M., on June 18th to prepare and present an affidavit of bias and prejudice to the Trial Judge before the final decree was entered, but neither petitioner nor his general or local counsel appeared before the Court or made any objection to the entry of the decree, and did not present any affidavit within that time. Respondents contend that under the Act and the authorities cited all of the delays in filing such affidavit were fatal and made the affidavit legally insufficient under the Act. The Trial Judge held the affidavit legally insufficient and entered an order to strike it from the files, which was proper under the authorities cited above.

IV.

DISCUSSION OF PETITIONER'S BRIEF

Throughout the entire proceedings general counsel for petitioner, Mr. Schullman, has considered that if the petitioner, Otto Refior, or Mr. Schullman did not specifically approve the actions of local counsel for the petitioner, the petitioner and his general counsel were not bound. Local counsel would appear before the Court on behalf of the petitioner and after argument of motions the Court would make a ruling which the Court and the respondents' counsel would consider was binding on all parties. Petitioner's general counsel would then come in and reargue the entire question as though the petitioner had never before been represented before the Court. Naturally the Trial Judge took issue with Mr. Schullman on this point. Notwithstanding this, Mr. Schullman refused to accept the rulings which had been made and carried his arguments to the point where any Judge would have lost patience with Mr. Schullman. Also, Mr. Schullman knew on April 29, 1941, that the case would proceed before the Master on May 13th unless the order of reference was revoked on May 12th (249). Mr. Schullman was also advised by the Judge that it would be necessary that his discharged local counsel be paid or a bond deposited to insure payment of discharged local counsel before any other local counsel could proceed. Any reasonable attorney would have been prepared to go ahead before the Master as the Judge directed, or would have been prepared to accept a decree against his client. Mr. Schullman did not only not prepare to proceed before the Master but he refused to comply with the order of the

Judge to file a bond to protect the discharged local counsel. Counsel for respondents contend that the Trial Judge was extremely lenient under the circumstances with Mr. Schullman, and that a great majority of trial judges would have considered the matter closed on May 13th when the Judge ordered the limited reference on auditing matters only to proceed before the Master. Judge Picard, however, in an effort to be absolutely certain that petitioner would have no reason whatever to complain, followed this on May 22nd by ordering that the trial proceed before him peremptorily on June 17th, and that the petitioner be not biased whatever by any of the proceedings which took place before the Master (120-121). Again any reasonable trial counsel would have been absolutely certain that after all that had gone before, there could be no adjournments whatever for any reason when the case was called for trial on June 17th, and would have been completely prepared for trial on June 17th, and would have been absolutely certain that discharged local counsel had been protected by an adequate bond long before the trial date. However, Mr. Schullman did not file the bond to protect local counsel until June 16th, and then filed a bond which was not in accordance with the specific orders of the Trial Judge. Counsel for respondents cannot believe that Mr. Schullman and local trial counsel were sincere in the proceedings which took place before the Judge on June 17th. We believe that Mr. Schullman deliberately created a situation which gave his local counsel the excuse to withdraw from the case in an effort to gain a further continuance. As petitioner had kept the respondent Corporation tied up with restraining orders and injunctions so that no stockholders' meetings could be held and no directors' meetings could be held to do anything other

than such affairs as came up in the ordinary course of business, he desired to continue to embarrass the individual respondents and the respondent Corporation to carry out a threat which the petitioner had made to the individual respondents, that if they did not buy his stock in the respondent Corporation at his price he would make them so much trouble that they would be glad to pay him three times the amount which he had asked. Counsel for respondents made these same statements in motion to strike the affidavit and on hearing before the Trial Judge (220). The Trial Judge however did not permit everything which had gone before to influence him in his judgment about the rights of the petitioner, but notwithstanding everything which had transpired he did on June 17th, after local counsel had withdrawn, grant the petitioner a further one week's adjournment upon payment of costs of $100.00 to secure new local counsel to proceed in the case. We cannot believe that any criticism whatsoever could be directed against the Trial Judge for any of the actions which he took in this case.

Petitioner's general counsel contends that petitioner could not proceed to trial of the case without local counsel. The fact remains, however, that in 1935 when this case was on for trial before Judge Moinet, petitioner's general counsel was admitted to the Bar of the Eastern District of Michigan for the purpose of trying this case. He made the opening statement, conducted the examination of the witnesses on the stand and argued all of the questions with the Trial Judge, and his then local counsel did not participate in the proceedings at all. He was therefore fully equipped and should have been prepared to try this case when it came on for trial this time, and local counsel would not have been

required to be familiar with all of the details of the case as Mr. Schulhman, through his intimate contact with the entire case since the original bill of complaint was filed in 1935, was perfectly competent to conduct the trial. We therefore believe that all of the argument made by petitioner in his brief that the petitioner had no opportunity to secure local counsel and properly prepare for the trial of the case is not justified under the facts.

Petitioner contends that the Trial Judge should have assigned this case to another judge after the final decree had been entered. No affidavit of bias and prejudice was filed which would cause the Trial Judge to consider any reassignment until approximately two weeks after the final decree, so we do not consider that this criticism has any justification whatever. The Trial Judge also informed counsel for petitioner that Judge Moinet had stated to the Trial Judge that he did not believe that the petitioner wanted to try his case (193-194). So two competent Trial Judges arrived at the same conclusion. We submit that no other conclusion was possible in view of the facts in this case.

Counsel for petitioner blames the Trial Judge for the withdrawal of his local counsel. As we have previously stated, it is quite apparent from all the circumstances that local counsel withdrew either because of their complete disgust with the stalling tactics of the general counsel for the petitioner, or as a means of securing a continuance. Certainly there was no obligation on the Trial Judge to compel local counsel to proceed in a case with which they were not in sympathy. It is only necessary to read the bill of complaint and the answers filed in this case to fully understand why local counsel were not overly anxious to try this case.

Judging from the fact that Miller, Canfield, Paddock & Stone, Griffin, Heal & Emery and Atkinson & Donnelly all deserted the petitioner's case, you can only reach the conclusion that petitioner's proofs did not substantiate the allegations of his bill of complaint after a thorough examination of the respondents' pleadings.

Counsel for respondents believe and say with confidence that in the event petitioner had been prepared to go ahead with the trial of this case on the 17th of June he could not possibly have gotten a fairer trial judge to try the case than Judge Picard. The Judge very clearly stated to the petitioner that he thought that if he were to try the case after what had happened he would probably lean over backwards and the respondents might suffer. We are inclined to share the Judge's feelings in this regard and believe that if the petitioner had shown the slightest evidence of being ready for trial and proceeding with trial of the case, Judge Picard would have been so happy over the abandonment of the stalling tactics by the petitioner that he would have given the petitioner more than an even break.

Petitioner's brief stresses the fact that no hearing was ever had on this case on the merits. We submit that the Record is clear that the only reason no hearing was had on the merits is that he never took advantage of his many opportunities to have a full and complete hearing not only before the Special Master, where all facts could be produced, but also before the Trial Court.

Counsel for petitioner cite *Brown v. Fletcher,* 182 Fed. 963, as authority for contention that the case should have been dismissed without prejudice. Reference to this case shows that the motion to dismiss the case was made strictly

on the basis of want of prosecution, and the Trial Court in that case did dismiss the case solely upon that ground and the Circuit Court of Appeals said (p. 982):

> "Since the court below definitely stated in its decree a single and sufficient ground for dismissal (want of prosecution), and omitted to state any other ground set out in either the proceedings or discussed in the opinion, there is no foundation for the second plea."

The case therefore presented a far different question than the one we are now considering.

Petitioner also cites *Pueblo, etc., v. Archuleta,* 64 Fed. (2d) 807. The Circuit Court of Appeals for the Tenth Circuit there said:

> "There could be no such adjudication between the parties in this case, for the defendants, not being in court, could not be concluded by such adjudication."

Also, the case of *Patting v. Spring Valley Coal Co.,* 98 Fed. 811, cited by counsel for petitioner, has the same distinguishing features. The Court clearly stated in the opinion as follows:

> "The plaintiff not appearing, and there being no reason for delay or indulgence, the proper course was to dismiss the action for want of prosecution."

Counsel for petitioner also cites the case of *Shaw v. Birk,* 67 Fed. (2d) 851. It appeared in that case that at the time the case came on for trial the defendant made a complete change of front as to the defense to be introduced, and the plaintiff was not prepared to meet this new defense with the evidence which he then had available. The Court said (p. 852):

> "Shaw had the right, if he was not compelled, to rely for recovery upon the foreign judgment up to the very day of the final trial. He was placed at a serious disadvantage by Birk's sudden change of front. The judgment against him should at least have been without prejudice to his original cause of action based on the contract."

The facts of the case were such as to distinguish it from the case we are now considering.

As support for petitioner's contentions with regard to the affidavit of bias and prejudice, petitioner cites *Morris v. United States,* 26 Fed (2d) 444. In that case an affidavit of bias and prejudice was held sufficient, but the failure to file until the day of trial was justified by the fact that on the very day of trial the party making the affidavit received new information which was imparted to his attorneys in substantiation of the facts set forth in the affidavit of bias and prejudice, and this was held sufficient to justify the filing of the affidavit after the term of court had commenced. The case was determined entirely upon the basis of the particular facts surrounding a criminal trial and are not applicable to this case in any way.

Petitioner also cites *Nations v. United States,* 14 Fed. (2d) 507, in support of his petition. In that case an affidavit of bias and prejudice was filed and held sufficient, but the Circuit Court of Appeals specifically stated on page 509 as follows:

> "With these rulings in mind, let us examine the affidavit in the case at bar. It was made by a party to the action. It was not made and filed ten days before the beginning of the term of court but good cause was shown for such failure. The trial had not

> commenced. Delay of the trial was not involved for the trial was postponed by the court of its own motion for more than thirty days after the filing of the affidavit."

We do not review the remaining cases cited by petitioner's counsel for they are not important in determining the issues of this case. The brief of petitioner is very largely based on colloquies between the Trial Judge and general counsel for petitioner, by which petitioner attempts to convince this Court that the Trial Judge was prejudiced against the petitioner because he expressed dissatisfaction with the tactics of counsel in attempting to stall the trial of the case.

V.

CONCLUSION

At the hearing on July 7, 1941 (230), Judge Picard very aptly said:

> "This Court is convinced that the plaintiff in this case is not desirous of trying out the merits of the case; that he has purposely instituted an action against his own brothers and has kept the firm known as the Lansing Drop Forge Company in a turmoil for five or six years, and that it was time that somebody stepped in and put an end to this practice, especially when the country, the United States of America, is engaged upon defense work and the Court being informed that the Lansing Drop Forge Company is also engaged in defense work."

Since the granting of the original restraining orders in this case, petitioner has rested on these orders and has prevented any meetings of stockholders for any purpose whatsoever, and has prevented directors from taking any action except in the ordinary and usual course of business. By means of these restraining orders, he has for a period

of over six years prevented the payment of cumulative preferred dividends, has prevented all plant expansion which was badly needed to meet the necessities of the business of the respondent Corporation, and has prevented the payment of any bonuses to the officers entitled thereto, and prevented the raising of salaries which were very low, as it has always been the policy of the Company to pay low salaries and compensate for services rendered by payment of bonuses in prosperous years. As a result, the individual respondents have not received, for a period of six years, compensation for services performed to which they were properly entitled. At the same time it must be pointed out that the petitioner conducts a business under the name of the Alleghany Forging Company, which is in competition with the Lansing Drop Forge Company, and petitioner contacts prospective and old customers of the Lansing Drop Forge Company and prejudices its business by informing such customers that the Lansing Drop Forge Company is in serious litigation in the Federal Court, and this has resulted in numerous failures on the part of the Lansing Drop Forge Company to secure business which it otherwise would have secured (158).

Respondents contend that the writ of certiorari should be denied.

Respectfully submitted,

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